

Claims 27-34/35-42 as being drawn to a non-elected invention. Apparently, the Examiner previously took the position that having Claim 8 “withdrawn” was not sufficient to avoid that claim also being “pending” for purposes of asserting the Examiner’s previous election requirement. Applicant respectfully submits that, with Claim 8 now “cancelled” (without prejudice to refile Claim 8 and related claims at a later time in this or a subsequent application), the Examiner’s position on that “election” regarding Claims 27-34/35-42 now is moot.

More specifically, there does not appear to be any difference of position (between the Examiner and Applicant) regarding Applicant’s elected Claim 2 – in response to the Examiner’s earlier restriction requirement, Applicant elected the invention to which Claim 2 and other pending claims are directed. In Applicant’s RESPONSE TO ELECTION/RESTRICTION REQUIREMENT (filed on or about July 3, 2006), Applicant “withdrew” ONLY Claims 8-18. Rather than indicating Claims 27-34 as also being WITHDRAWN, Applicant believed that it was appropriate and more efficient to bring Claims 27-34 back into this pending application (for consideration by the Examiner) by amending those to depend from the elected invention set forth in elected Claim 2.

The Examiner apparently believes that such an amendment of those Claims 27-34 is improper and outside of Applicant’s power, and that the only way to get those “amended” claims 27-34 into the application is to refile them as new claims (which Applicant has done, as Claims 35-42).

Accordingly, Applicant respectfully submits that Claims 2, 3, 5-7, and 35-42 are currently in condition for examination (and for allowance, as further explained below). Among other things, based on the allowability of Claim 2 (as discussed below), all claims depending from that

allowable claim 2 (including the aforementioned Claims 35-42) should likewise be allowable.

Applicant thus intends the remarks herein to support that allowability (of Claim 2 and ALL of the other pending claims, including 35-42), and respectfully requests prompt notice of same.

Applicant also notes that much of the discussion below regarding Claim 2's allowability was included in Applicant's preceding filing. Based on the aforementioned conferences with the Examiner and Supervisor, Applicant understands that the Examiner did NOT previously consider those remarks, and instead issued the 3/21/07 communication directed solely to the "formal" issue of designation of Claims 27-34. Accordingly, Applicant understands that, based on the "formal" amendments herein, the Examiner now WILL consider the remarks regarding allowability of Claim 2, etc.

In case the Examiner is considering any further imposition of a "restriction" on the claims pending after the entry of THIS amendment, Applicant sets forth what Applicant believes to be relevant sections of the MPEP. Applicant respectfully submits that, in case the Examiner apparently took the position that a "withdrawn" Claim 8 was still "pending" (and therefore might provide a basis for continuing restriction of Claims 27-34/35-42), the analysis of the currently "pending" claims under these MPEP provisions demonstrates that Claims 27-34/35-42 cannot properly be "restricted" from the present application. Among other things, those Claims all properly depend from Claim 2 (which is indisputably "elected" in this application), and therefore are not subject to the Examiner's restriction.

In passing, Applicant also expressly reserves the right, as part of any further prosecution of this application or otherwise, to challenge the constitutionality of the Patent Office's interpretation and/or application of 35 USC 121, 37 CFR 1.142: "If two or more *independent*

and distinct inventions are claimed in a single application..." (emphasis added). Specifically, and among other things, the Patent Office interpretation of that provision changes it from the plain meaning adopted by Congress ("*independent and distinct*") and within the CFR to a "distinctly" different phrase (*independent OR distinct*). If Congress intended "or" instead of "and", Congress would have (or should have) said so. If the Patent Office believes "or" was Congress' intent, the Patent Office should seek clarification/correction from Congress in that regard, rather than implementing an interpretation that is "distinctly" contrary to the plain language employed and adopted by Congress.

For the convenience of all concerned, Applicant has below erred on the side of quoting more, rather than less, of the apparently relevant MPEP provisions. Among other things, this includes the aforementioned apparently unconstitutional misinterpretation/application of 35 USC 121 and 37 CFR 1.142. Even WITH that unconstitutional misinterpretation/application by the Patent Office, Applicant respectfully submits that the current Claims 27-34/35-42 should be considered and allowed.

MPEP §801

801 Introduction - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

This chapter is limited to a discussion of the subject of restriction and double patenting under Title 35 of the United States Code and Title 37 of the Code of Federal Regulations as it relates to national applications filed under 35 U.S.C. 111(a). The discussion of unity of invention under the Patent Cooperation Treaty Articles and Rules as it is applied as an International Searching Authority, International Preliminary Examining Authority, and in applications entering the National Stage under 35 U.S.C. 371 as a Designated or Elected Office in the U.S. Patent and Trademark Office is covered in Chapter 1800.

802 Basis for Practice in Statute and Rules - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

MPEP §802

802 Basis for Practice in Statute and Rules

The basis for restriction and double patenting practices is found in the following statute and rules:

35 U.S.C. 121 Divisional applications.

If two or more independent and distinct inventions are claimed in one application, the Director may require the application to be restricted to one of the inventions. If the other invention is made the subject of a divisional application which complies with the requirements of section 120 of this title it shall be entitled to the benefit of the filing date of the original application. A patent issuing on an application with respect to which a requirement for restriction under this section has been made, or on an application filed as a result of such a requirement, shall not be used as a reference either in the Patent and Trademark Office or in the courts against a divisional application or against the original application or any patent issued on either of them, if the divisional application is filed before the issuance of the patent on the other application. If a divisional application is directed solely to subject matter described and claimed in the original application as filed, the Director may dispense with signing and execution by the inventor. The validity of a patent shall not be questioned for failure of the Director to require the application to be restricted to one invention.

37 CFR 1.141 Different inventions in one national application.

(a) Two or more independent and distinct inventions may not be claimed in one national application, except that more than one species of an invention, not to exceed a reasonable number, may be specifically claimed in different claims in one national application, provided the application also includes an allowable claim generic to all the claimed species and all the claims to species in excess of one are written in dependent form (§ 1.75) or otherwise include all the limitations of the generic claim.

(b) Where claims to all three categories, product, process of making, and process of use, are included in a national application, a three way requirement for restriction can only be made where the process of making is distinct from the product. If the process of making and the product are not distinct, the process of using may be joined with the claims directed to the product and the process of making the product even though a showing of distinctness between the product and process of using the product can be made.

37 CFR 1.142 Requirement for restriction.

(a) If two or more independent and distinct inventions are claimed in a single application, the examiner in an Office action will require the applicant in the reply to that action to elect an invention to which the claims will be

restricted, this official action being called a requirement for restriction (also known as a requirement for division). Such requirement will normally be made before any action on the merits; however, it may be made at any time before final action.

(b) Claims to the invention or inventions not elected, if not canceled, are nevertheless withdrawn from further consideration by the examiner by the election, subject however to reinstatement in the event the requirement for restriction is withdrawn or overruled.

The pertinent Patent Cooperation Treaty (PCT) Articles and Rules are cited and discussed in Chapter 1800. Sections 1850, 1875, and 1893.03(d) should be consulted for discussions on unity of invention:

- (A) before the International Searching Authority;
- (B) before the International Preliminary Examining Authority; and
- (C) in the National Stage under 35 U.S.C. 371.

802.01 Meaning of "Independent" and "Distinct" [R-5] - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

35 U.S.C. 121 quoted in the preceding section states that the Director may require restriction if two or more "independent and distinct" inventions are claimed in one application. In 37 CFR 1.141, the statement is made that two or more "independent and distinct inventions" may not be claimed in one application.

This raises the question of the inventions as between which the Director may require restriction. This, in turn, depends on the construction of the expression "independent and distinct" inventions.

"Independent", of course, means not dependent>, or unrelated<. If "distinct" means the same thing, then its use in the statute and in the rule is redundant. If "distinct" means something different, then the question arises as to what the difference in meaning between these two words may be. The hearings before the committees of Congress considering the codification of the patent laws indicate that 35 U.S.C. 121: "enacts as law existing practice with respect to division, at the same time introducing a number of changes."

The report on the hearings does not mention as a change that is introduced, the inventions between which the Director may properly require division.

The term "independent" as already pointed out, means not dependent>, or unrelated<. A large number of inventions between which, prior to the 1952 Act, division had been proper, are dependent inventions, such as, for example, combination and a subcombination thereof; as process and apparatus used in the practice of the process; as composition and the process in which the composition is used; as process and the product made by such process, etc. If

section 121 of the 1952 Act were intended to direct the Director never to approve division between dependent inventions, the word "independent" would clearly have been used alone. If the Director has authority or discretion to restrict independent inventions only, then restriction would be improper as between dependent inventions, e.g., the examples used for purpose of illustration above. Such was clearly not the intent of Congress. Nothing in the language of the statute and nothing in the hearings of the committees indicate any intent to change the substantive law on this subject. On the contrary, joinder of the term "distinct" with the term "independent", indicates lack of such intent. The law has long been established that dependent inventions (frequently termed related inventions) such as used for illustration above may be properly divided if they are, in fact, "distinct" inventions, even though dependent.

I. INDEPENDENT

The term "independent" (i.e., **>unrelated<) means that there is no disclosed relationship between the two or more inventions claimed, that is, they are unconnected in design, operation, and effect. For example, a process and an apparatus incapable of being used in practicing the process are independent inventions. See also MPEP § 806.06 and § 808.01.

II. >RELATED BUT< DISTINCT

Two or more inventions are related (i.e., not independent) if they are disclosed as connected in at least one of design (e.g., structure or method of manufacture), operation (e.g., function or method of use), or effect. Examples of related inventions include combination and part (subcombination) thereof, process and apparatus for its practice, process and product made, etc. In this definition the term related is used as an alternative for dependent in referring to inventions other than independent inventions.

Related inventions are distinct if the inventions as claimed are not connected in at least one of design, operation, or effect (e.g., can be made by, or used in, a materially different process) and wherein at least one invention is PATENTABLE (novel and nonobvious) OVER THE OTHER (though they may each be unpatentable over the prior art). See MPEP § 806.05(c) (combination and subcombination) and § 806.05(j) (related products or related processes) for examples of when a two-way test is required for distinctness.

It is further noted that the terms "independent" and "distinct" are used in decisions with varying meanings. All decisions should be read carefully to determine the meaning intended.

802.02 Definition of Restriction [R-3]

Restriction **>is< the practice of requiring an **>applicant to elect a single claimed invention (e.g., a combination or subcombination invention, a

product or process invention, a species within a genus) for examination when two or more independent inventions and/or two or more distinct inventions are claimed in an application.<

806 Determination of Distinctness or Independence of Claimed Inventions [R-3] - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

806 Determination of Distinctness or Independence of Claimed Inventions [R-3]

The general principles relating to distinctness or independence may be summarized as follows:

(A) Where inventions are independent (i.e., no disclosed relation therebetween), restriction to one thereof is ordinarily proper, MPEP § **>806.06<.

(B) Where inventions are related as disclosed but are distinct as claimed, restriction may be proper.

(C) Where inventions are related as disclosed but are not distinct as claimed, restriction is never proper.

(D) A reasonable number of species may be claimed when there is an allowable claim generic thereto. 37 CFR 1.141, MPEP § 806.04.<

Where restriction is required by the Office double patenting cannot be held, and thus, it is imperative the requirement should never be made where related inventions as claimed are not distinct. For (B) and (C) see MPEP § 806.05 - § *>806.05(j)< and § 809.03. See MPEP § 802.01 for criteria for patentably distinct inventions.

806.01 Compare Claimed Subject Matter [R-3] - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

In passing upon questions of double patenting and restriction, it is the claimed subject matter that is considered and such claimed subject matter must be compared in order to determine the question of distinctness or independence. >However, a provisional election of a single species may be required where only generic claims are presented and the generic claims recite such a multiplicity of species that an unduly extensive and burdensome search is necessary. See MPEP § 803.02 and § 808.01(a).<

806.03 Single Embodiment, Claims Defining Same Essential Features [R-3] - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

Where the claims of an application define the same essential characteristics of a single disclosed embodiment of an invention, restriction

therebetween should never be required. This is because the claims are *>not directed to distinct inventions; rather they are< different definitions of the same disclosed subject matter, varying in breadth or scope of definition.

Where such claims *>are voluntarily presented< in different applications **>having at least one common inventor or a common assignee (i.e., no restriction requirement was made by the Office)<, disclosing the same embodiments, see MPEP § 804 - § 804.02.

806.04 **>Genus and/or Species< Inventions [R-3] - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

**>Where an application includes claims directed to different embodiments or species that could fall within the scope of a generic claim, restriction between the species may be proper if the species are independent or distinct. However, 37 CFR 1.141 provides that an allowable generic claim may link a reasonable number of species embraced thereby. The practice is set forth in 37 CFR 1.146.

37 CFR 1.146 Election of species.

In the first action on an application containing a generic claim to a generic invention (genus) and claims to more than one patentably distinct species embraced thereby, the examiner may require the applicant in the reply to that action to elect a species of his or her invention to which his or her claim will be restricted if no claim to the genus is found to be allowable. However, if such application contains claims directed to more than a reasonable number of species, the examiner may require restriction of the claims to not more than a reasonable number of species before taking further action in the application.

806.04(b) Species May Be >Independent or< Related Inventions [R-3] - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

Species **>may be either< independent **>or< related under the particular disclosure. >Where species under a claimed genus are not connected in any of design, operation, or effect under the disclosure, the species are independent inventions. See MPEP § 802.01 and § 806.06.< Where inventions as disclosed and claimed are both (A) species under a claimed genus and (B) related, then the question of restriction must be determined by both the practice applicable to election of species and the practice applicable to other types of restrictions such as those covered in MPEP § 806.05 - § *>806.05(j)<. If restriction is improper under either practice, it should not be required.

For example, two different subcombinations usable with each other may each be a species of some common generic invention. **>If so,< restriction practice under election of species and the practice applicable to restriction between combination and subcombinations >must be addressed<.

As a further example, species of carbon compounds may be related to each other as intermediate and final product. Thus, these species are not independent and in order to sustain a restriction requirement, distinctness must be shown. Distinctness is proven if >the intermediate and final products do not overlap in scope and are not obvious variants and< it can be shown that the intermediate product is useful other than to make the final product. Otherwise, the disclosed relationship would preclude their being issued in separate patents. >See MPEP § 806.05(j) for restriction practice pertaining to related products, including intermediate-final product relationships.<

806.04(d) Definition of a Generic Claim [R-3] - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

In an application presenting three species illustrated, for example, in Figures 1, 2, and 3, respectively, a generic claim should read on each of these views; but the fact that a claim does so read is not conclusive that it is generic. It may define only an element or subcombination common to the several species.

**In general, a generic claim should *>require< no material element additional to those **>required by< the species claims, and ** each of the species >claims must require all the limitations of the generic claim<.

Once a **>generic claim is allowable<, all of the claims drawn to species in addition to the elected species which *>require< all the limitations of the generic claim will ordinarily be * allowable >over the prior art< in view of the *>allowability< of the generic claim, since the additional species will depend thereon or otherwise *>require< all of the limitations thereof. When all or some of the claims directed to one of the species in addition to the elected species do not *>require< all the limitations of the generic claim, ** see MPEP § *>821.04(a)<.

806.04(e) Claims Limited to Species [R-5] - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

Claims are definitions >or descriptions< of inventions. Claims >themselves< are never species. The scope of a claim may be limited to a single disclosed embodiment (i.e., a single species, and thus be designated a specific species claim)*>. Alternatively,< a claim may *>encompass< two or more of the disclosed embodiments** (and thus be designated a generic or genus claim).

*Species * always >refer to< the * different embodiments >of the invention<.*

Species may be either independent or related as disclosed (see MPEP § 806.04 and § 806.04(b)).

806.04(f) **>Restriction Between< Mutually Exclusive *>Species< [R-3] -
800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

>Where two or more species are claimed, a requirement for restriction to a single species may be proper if the species are mutually exclusive.< Claims ** to different species **>are mutually exclusive if< one claim recites limitations **>disclosed for< a first species but not * a second, while a second claim recites limitations disclosed only for the second species and not the first. This **>may also be< expressed by saying that >to require restriction between claims limited to species, the< claims ** must not overlap in scope<.

806.04(h) Species Must Be Patentably Distinct From Each Other [R-3] -
800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

In making a requirement for restriction in an application claiming plural species, the examiner should group together species considered clearly unpatentable over each other **.

Where generic claims are **>allowable<, applicant may claim in the same application additional species as provided by 37 CFR 1.141. >See MPEP § 806.04. Where an applicant files a divisional application claiming a species previously claimed but nonelected in the parent case pursuant to and consonant with a requirement to restrict a double patenting rejection of the species claim(s) would be prohibited under 35 U.S.C. 121. See MPEP § 821.04(a) for rejoinder of species claims when a generic claim is allowable.<

Where, however, ** claims to a different species, or * a species disclosed but not claimed in a parent case as filed and first acted upon by the examiner, >are voluntarily presented in a different application having at least one common inventor or a common assignee (i.e., no requirement for election pertaining to said species was made by the Office)< there should be close investigation to determine **>whether a double patenting rejection would be appropriate<. See MPEP § 804.01 and § 804.02.

806.04(i) Generic Claims Presented ** After Issue of Species [R-3] -
800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

**>If a generic claim is< presented ** after the issuance of a **>patent claiming one or more species within the scope of the generic claim<, the Office may reject the generic *>claim< on the grounds of obviousness-type double patenting >when the patent and application have at least one common inventor and/or are either (1) commonly assigned/owned or (2) non-commonly assigned/owned but subject to a joint research agreement as set forth in 35 U.S.C. 103(c)(2) and (3). See MPEP § 804.< Applicant may overcome such a rejection by filing a terminal disclaimer. See >In re Goodman, 11 F.3d 1046, 1053, 29 USPQ2d 2010, 2016 (Fed. Cir. 1993);< In re Braithwaite, 379 F.2d 594, 154 USPQ 29 (CCPA 1967).

806.05 Related Inventions [R-5] - 800 Restriction in Applications Filed Under 35 U.S.C. 111; Double Patenting

Where two or more related inventions are claimed, the principal question to be determined in connection with a requirement to restrict or a rejection on the ground of double patenting is whether or not the inventions as claimed are distinct. If they are distinct, restriction may be proper. If they are not distinct, restriction is never proper. If nondistinct inventions are claimed in separate applications or patents, double patenting must be held, except where the additional applications were filed consonant with a requirement to restrict.

Various pairs of related inventions are noted in the following sections. In applications claiming inventions in different statutory categories, only one-way distinctness is generally needed to support a restriction requirement. See MPEP § 806.05(c) (combination and subcombination) and § 806.05(j) (related products or related processes) for examples of when a two-way test is required for distinctness. >Related inventions in the same statutory class are considered mutually exclusive, or not overlapping in scope, if a first invention would not infringe a second invention, and the second invention would not infringe the first invention.<

CLAIM REJECTIONS

Turning now to the Examiner's previous "substantive" rejections, Applicant resubmits much of Applicant's Remarks section from Applicant's February 15, 2007 Amendment.

Claims 2, 3, and 5-7 were rejected under 35 U.S.C. §102(b) as allegedly being anticipated by U.S. Patent No. 4,037,626 issued to Roberts.

With all due respect, Roberts does not appear to disclose or make obvious ANY (or very few) of the elements claimed in Applicant's Claim 2. By way of example, Applicant's Claim 2 requires "a first female engagement structure formed from the sidewall corrugation pattern of the first piece of pipe." Because the Examiner does not identify in the Office Action the specific features of Roberts asserted as teaching this (or any of the other) elements of Applicant's claim, Applicant is left to speculate based on Roberts' specification and drawings. In that regard, Roberts' only apparent teaching of a "corrugated" pipe is pipe 11. Those corrugations 11 have no

"engagement" function at all. Instead, Roberts' corrugations 11 "slide over and provide crush resistance" to the actual joint/"engagement" of Roberts' patent (col. 1, l. 55-57; col. 2, l. 65-66).

Thus, Roberts does NOT teach or suggest or otherwise make obvious Applicant's claimed "female engagement structure" formed from a sidewall corrugation pattern.

The same shortcomings exist in Roberts with respect to Applicant's claimed "male engagement structure formed from the sidewall corrugation pattern of the second piece of pipe." No such "male engagement structure" formed from sidewall corrugation is taught or made obvious by Roberts.

Roberts' shortcomings become even more clear in connection with other of Applicant's Claim 2 limitations: the first female structure not only has to (1) receive the male structure, but also (2) grip the male structure with sufficient compressive force to "prevent its inadvertent removal from engagement with the first female structure." As noted above, nothing in Roberts teaches or makes obvious ANY engagement of structures formed from sidewall corrugation patterns.

Instead, the teaching of Roberts (as stated in the abstract, for example) is for a "pipe structure [that] includes an outer corrugated pipe, an inner smooth-walled liner, and joining means including a bell fitting at one end of the liner extending beyond the outer corrugated pipe and a spigot fitting at the other end." Thus, Roberts' "joining means" (its ENGAGEMENT structures) are something OTHER than the corrugated pipe 11.

Specifically, Roberts teaches that two such pipes may be temporarily joined or sealed by using an O-ring seal 16 (Fig. 4; col. 3, l. 4-10), or may be permanently joined ("engaged" with each other) by solvent welding seal 16 (Fig. 3; col. 3, l. 10-23). As indicated above, the pipe

structure of Roberts is clearly defined as having an inner liner pipe and an outer corrugated pipe. As shown in Figure 3 of Roberts, the pipe joint of Roberts is formed by joining the bell fitting 13 at one end of a inner liner 10 with the spigot portion 14 at the other end of another inner liner 10. Thus, in comparing the present invention and Roberts, the Roberts joint method utilizes the pipe liner having a typical bell (male end) and spigot (female) to form a pipe joint by joining the opposite ends of the liner of two different pipes.

Although the present invention includes an inner liners, those liners of the two joined pipe sections simply butt together to form a continuous smooth inner-wall. In other words, the inner liner of the present invention is not the claimed engagement structure of the joint that connects two similarly formed pipe sections together (although in certain embodiments the liner could also provide or form some "engagement" between adjacent pipe sections, in addition to the engagement structures presently claimed in pending Claim 2).

The bell fitting of Roberts, referred to in the industry as the female end, is formed as part of Roberts' inner liner (not Roberts' corrugations 11). The inner liner bell of Roberts is sized and shaped in a fixed configuration so that it overlaps the inner spigot of the adjacent adjoining inner liner pipe structure (rather than being sized and shaped to grip the adjacent pipe section).

In stark contrast to Roberts, the present invention teaches away from such a typical fixed configuration bell and spigot joint. The male and female members of the present invention are formed from the outer corrugated wall portion of the pipe structures. Roberts requires the inner liner wall pipe have a dedicated bell and spigot aspect to it, sized and shaped to fit over and slide into position to be "sealed" via an O-ring or welding sealant 16. Without that O-ring or welding sealant 16, Roberts' device would not even be "joined", at least not in any sealed manner.

Although sealant can be used with various embodiments of the present invention, embodiments of Claim 2 provide engagement between adjacent pipes, which engagement is not dependent upon some separate "sealant" element 16.

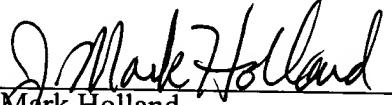
As indicated above, the Roberts corrugations of the outer pipe at the spigot end are undercut so as to slide over and provide crush resistance to the joint that is formed when the spigot of one composite pipe section is inserted into and engaged with the bell of an adjacent composite pipe section. Roberts' corrugated portion 11 protects the inner liner bell and spigot joint. Clearly the corrugated pipe in Roberts is distinct, only protecting the joint formed by the bell and spigot of the inner liner.

In view of the remarks set forth above, it is thought that the application is now in condition for allowance, notice whereof is respectfully requested of the Examiner.

If the Examiner has any questions regarding the foregoing, or if the Examiner would like to discuss any remaining or new issues regarding this communication, the Examiner is invited to contact the Applicant's representative at (949) 718-6750.

Respectfully submitted,

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